STATE OF MAINE
PUBLIC UTILITIES COMMISSION

November 14, 2000

PUBLIC UTILITIES COMMISSION
Investigation into Use of Central Office Codes (NXXs) by New England Fiber Communications, LLC d/b/a Brooks Fiber

Docket No. 98-758

NEW ENGLAND FIBER COMMUNICATIONS D/B/A BROOKS FIBER
Proposed Tariff Revision To Introduce Regional Exchange (RX) Service

Docket No. 99-593

ORDER ON RECONSIDERATION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. INTRODUCTION

In this Order, we grant the motion of New England Fiber Communications d/b/a Brooks Fiber (Brooks) to reconsider our orders in the two cases named above, but decide that we will not change our final orders in either case except as to the date that the North American Numbering Plan Administrator (NANPA) must reclaim codes assigned to Brooks. Pursuant to comments (not part of a motion to reconsider) filed by RCN.com and Javanet, Inc., we will postpone the date on which the NANPA must reclaim the codes used by Brooks for unauthorized service until six months from the date of this Order on Reconsideration.

II. SCOPE OF MOTION FOR RECONSIDERATION

On July 20, 2000, Brooks filed a motion for reconsideration of the "Part 2 Order" in Docket No. 99-593. The Order (issued in two parts) in Docket No. 99-593 (hereinafter, the "tariff case") disapproved Brooks's proposed rates and terms and conditions for regional exchange (RX) service. The Part I Order (containing the conclusions and ordering paragraphs) was issued on May 26, 2000. The Part 2 Order was issued on June 30, 2000; it did not contain all of the ordering paragraphs included in the Part I Order, but did explain the Commission's reason for its decision.

The Part 2 Order in the tariff case was combined in the same document with Order No. 4 in the investigation case (Docket No. 98-758); the portion of the combined document that primarily addresses the rejection of the proposed tariff for RX service is Section V. Order No. 4 in the investigation case (Docket No. 98-758) consists of other portions of the combined document. In Order No. 4 we considered a wide variety of

issues and made a number of findings and conclusions, many of which directly relate to our decision to disapprove the tariff filing in the tariff case (Docket No. 99-593).

In its Motion, Brooks requested that we reconsider our disapproval of the RX tariff, but also specifically requested the Commission to vacate its order to the North American Numbering Plan Administrator (NANPA) to reclaim the 54 NXX codes assigned to Brooks that are outside of its Portland area exchange. The Order to the NANPA was issued in the investigation case (98-758). Brooks also continues to challenge other findings and conclusions in the investigation case. Those findings and conclusions serve as the underlying bases both for orders issued in the investigation case and for the order disapproving the proposed RX service in the tariff case.

Because Brooks's motion requests reconsideration of matters beyond those addressed in the Part 2 Order in the tariff case, we consider the motion to address both Order No. 4 in the investigation case (Docket No. 98-758) and the Order Disapproving Proposed Service (Parts 1 and 2) in the tariff case (Docket No. 99-593).

III. DISCUSSION

Brooks makes three arguments in support of its motion for reconsideration and asks the Commission to reverse several major findings and rulings that the Commission has made in these cases. First, it argues that any lack of authority to provide its unauthorized "FX-like" service (or its proposed RX service) is merely a "minor technical defect" consisting solely of the lack of an approved tariff. Second, Brooks argues that the Commission is without authority to require the North American Numbering Plan Administrator (NANPA) to reclaim the central office, or NXX, codes that Brooks has used, without authority, to provide "FX-like" service in areas throughout the State outside of its Portland area exchange. Specifically, Brooks argues that the powers delegated to state commissions by the FCC do not include the authority to require the NANPA to reclaim NXX codes under the circumstances of this case. Third, Brooks suggests that failure to approve its proposed service is a "barrier to entry," prohibited by 47 U.S.C. § 253(a). Brooks claims that the "barrier to entry" provision prohibits this Commission from rejecting the service that it claims is competitive and from preventing it from using multiple NXX codes in order to provide the service.[1]

We address each of the arguments below.

[1]Brooks also argues that "the Commission had no basis for determining whether Bell Atlantic's (now Verizon) rate for SNS/PRI service (now labeled PRI Hub Service) was reasonable." We see little reason why Brooks should be concerned with Verizon's rate for this service. As we explained in Order No. 4, no party, including Brooks, opposed the rates proposed by Verizon. We also noted that Brooks is free to compete with Verizon by offering a similar service, either through resale, by building its own facilities or by leasing existing facilities. We therefore do not reconsider this issue.

A. Lack of Approved Tariff

Brooks argues that its lack of authority to provide its proposed RX service (or its present virtually identical "FX-like" service) is a "minor technical" defect, curable by Commission approval of its proposed RX rate schedules and terms and conditions (tariff). Brooks is incorrect. Brooks's Argument assumes that the underlying service that it was offering without tariff (or the proposed service that was described in the tariff) is lawful. That is not the case.

As we made clear in the Part 2 Order in the tariff case (Docket No. 99-593) and in the Order No. 4 in the investigation case (Docket No. 98-758), we disapproved Brooks's proposed tariff for substantive reasons. We found that the proposed service offer was not just and reasonable within the meaning of Maine law, 35-A M.R.S.A. § 1306. In short, the fact that Brooks does not have an approved tariff is not a "technical" defect. It is the nature of the service itself that prevents approval of a tariff. The Commission routinely approves the vast majority of tariff changes presented to it by telephone carriers. Such approval is not automatic, however, and will be withheld if a proposed service or rate is not just and reasonable.

B. Authority to Require the NANPA to Reclaim NXX Codes

Brooks next argues that, even if the Commission has legitimately found that Brooks is without authority to provide the "FX-like" service, and the service is unlawful, the Commission is without authority to order the NANPA to reclaim central office (NXX) codes that Brooks is using to provide that unauthorized and unlawful service. Brooks points out that the *Delegation* Order[2] that granted the Maine PUC specific powers concerning the assignment and use of NXX codes has been superseded on a national basis by the Order adopted by the FCC in *In the Matter of Numbering Resource Optimization,* CC Docket No. 99-200 (March 17, 2000)(*Optimization* Order). Brooks argues that under the *Optimization O*rder, a state commission may order the NANPA to reclaim codes only if the carrier that has been assigned those codes has failed to "activate" them or has failed to assign numbers within the code to customers. *Optimization* Order at ¶237; 47 CFR § 52.15(i). To "activate" an NXX code, a carrier must enter it into the Local Exchange Routing Guide (LERG).

The paragraphs of the *Optimization* Order and the FCC regulations that Brooks relies upon do state that lack of "activation" and failure to assign numbers within a code are both grounds for a state commission to order the NANPA to reclaim codes. Those paragraphs and regulations do not mention other grounds.

[2] *In the Matter of Maine Public Utilities Commission, Petition for Additional Delegated Authority to Implement Number Conservation Measures,* CC Docket No. 96-98, Order (Sept. 28, 1999).

Nevertheless, the *Optimization* Order and FCC regulations make clear (as did the superseded *Delegation* Order) that a carrier must have the requisite authority to provide the proposed service(s) in the areas in question and that it has (or will have within 60 days) the requisite facilities to provide that service. Brooks states that the *Optimization* Order "does not impose any facilities requirement." Brooks is wrong. The *Optimization* Order at ¶¶ 96-98 states both the facilities and authority requirements that were previously required by the *Delegation* Order. The *Optimization* Order requires the NANPA to "withhold initial numbering resources from any carrier that does not comply with these requirements . . . ." The NANPA assigned 54 codes to Brooks even though it did not meet either of those criteria. Brooks is apparently suggesting that although state commissions have substantial authority, prior to the assignment of codes, to determine whether a carrier has authority to provide the service and the necessary facilities,[3] if a carrier somehow manages to get codes without meeting either or both of those requirements, state commissions have no authority to require the NANPA to reclaim the codes.

Brooks's position is untenable. In this case, Brooks obtained NXX codes and began using them to provide an unauthorized interexchange service. Brooks has continued to provide the service at all times without authority or an approved tariff.[4] The *Optimization* Order states:

> Thus, a carrier *shall not receive* numbering resources if it does not have the appropriate facilities in place, or is unable to demonstrate that it will have them in place, to provide service. To achieve our goal of maximizing the use of numbering resources, we require applications for initial numbering resources to include documented proof that (1) the applicant is authorized to provide service in the area for which the numbering resources are requested and (2) the applicant is or will be capable of providing service within 60 days of the numbering resources activation date.

Optimization Order at ¶ 96 (emphasis added). Brooks filed a proposed tariff only after this Commission discovered that Brooks was providing the service without an approved

[3] *See Optimization* Order at ¶¶ 97-98.

[4] The tariff that we recently approved for grandfathered service to existing customers (internet service providers, or ISPs) for six months was approved solely for the purpose of avoiding inconvenience to the ISPs and their customers (end-use dial-up internet users). That approval should not be construed as a finding that the service is reasonable or lawful for any purpose other than the limited purpose stated in this footnote.

tariff and also questioned the validity of the service on other substantive grounds. In short, Brooks is arguing that although it is necessary for a state commission initially to determine that a carrier has the required authority to provide a service and the necessary facilities, if a carrier "slips one by" the NANPA and the state commission, the state commission has no authority to require that the unlawfully-used codes be reclaimed. We reject that proposition. Without authority to provide the proposed service or the facilities to provide local exchange service, Brooks has never had and does not presently have a need for the NXX codes. We rule that the NANPA must rescind the unlawful assignment of NXX codes to Brooks. We affirm our decision to require the NANPA to reclaim the 54 NXX codes that Brooks does not have authority to use.

That the FCC's regulations do not expressly address reclamation when a carrier has improperly obtained codes may be due to an assumption that such issues should be addressed by the NANPA in advance. For example, the *Optimization* Order at ¶¶ 97 and 98 states:

> The burden is on the carrier to demonstrate that it is both authorized and prepared to provide service before receiving initial numbering resources. . . .
>
> We direct the NANPA to withhold initial numbering resources from any carrier that does not comply with these requirements. . . .

By contrast, the questions of whether a carrier has "activated" an assigned code and assigned numbers within the code to customers can only be addressed after the code has been assigned to the carrier. In that circumstance, it is obvious that the remedy is to reclaim the code.

We note that, in its Motion for Reconsideration, Brooks does not appear to contest the Commission's conclusions that NXX codes must be used for local exchange service rather than interexchange service, although it argues that the Commission's view of Brooks's service is overly narrow. In concluding, in Order No. 4, that NXX codes may only be used to provide local exchange service, we relied on the Maine *Delegation* Order and the NANPA Guidelines. As discussed above, the *Delegation* Order has been superseded by the *Optimization* Order. We conclude that the *Optimization* Order does not require us to reach a different result. The *Optimization* Order clearly shows that the FCC assumes that NXX codes will be used for local exchange service. Among the most important of these indicia is the fact that it mentions "interconnection agreements" in connection with evidence of readiness to provide service. Under 47 U.S.C. § 2151(c)(2), an interconnection agreement is only available for the "transmission and routing of telephone exchange service and exchange access." The *Optimization* Order also mentions contracts for unbundled network elements as another example of facilities-readiness. "Local loops" and "local switching" are two of the unbundled network elements established by the FCC. They are, of course, usually

associated with the provision of local exchange service, even though they may also carry interexchange traffic. Order No. 4 also relied on numerous indicia in the NANPA *Central Office Code Assignment Guidelines,* for determining that NXX codes are to be used for the provision of local exchange service. Those *Guidelines* have not changed.

C. The Commission is Not Required to Approve the Brooks Service

Brooks has offered unauthorized service that it has correctly characterized as "FX-like." It subsequently proposed a tariff for essentially the same service that it labeled Regional Exchange (RX) service. Brooks claims that its service competes with services offered by incumbent carriers. Indeed, as we found in Order No. 4 in the investigation case, the service provides much of the same function for customers as "traditional" foreign exchange (FX) service offered by both ILECs and CLECs.[5] Unlike Brooks's service, however, the "traditional" FX service offered by the ILECs does not use any NXX codes that are not also being used to provide local exchange service. We also found that the Brooks service strongly resembles 800 service, which, like FX, is an interexchange service, except that 800 service does not use multiple NXX codes.

Brooks argues that our refusal to approve its proposed RX service (which it persists in inaccurately labeling a local exchange service) constitutes an "impermissible barrier to entry" in violation of the TelAct. 47 U.S.C. § 253(a), enacted by the 1996 TelAct, states:

> No State or local statute or regulation, or other State or local legal requirement, many prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

We recognize the strong bias that section 253(a) creates in favor of competitive services. Brooks's argument, however, assumes that state commissions have no authority to assess the quality and effects of a proposed service that is labeled "competitive," or to determine whether a proposed service offends or interferes with valid state telephone regulatory policies, or is in the public interest; Brooks's argument apparently even assumes that state commissions have no authority to determine whether a service is an intrastate local or intrastate long distance service.

The question before us is whether Brooks is entitled to provide the proposed service, as defined and rated by Brooks, even though the service and its purported rating (as toll or local) contravenes the current rate design policy of this Commission which defines the dividing line between local and long distance service.

[5]We need not state in detail here the ways in which Brooks's proposed RX service and traditional FX service differ. We have described both of these services thoroughly in our prior orders.

Two important provisions in the Telecommunications Act qualify the "impermissible barrier to entry" provision quoted above. The first provision, also enacted by the 1996 TelAct, is the very next subsection following the "barrier to entry" provision:

> (b) STATE REGULATORY AUTHORITY. – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(b).

The second provision is part of the original 1935 Telecommunications Act and was unchanged by the 1996 TelAct. That provision is 47 U.S.C. § 152(b), which continues to state that "nothing in the [Telecommunications] Act shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, *classifications*, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier" (emphasis added).

Regulation of intrastate telecommunications is therefore expressly reserved for the states. States retain considerable authority to disapprove a new service that contravenes state intrastate telephone policy. Maine law requires this Commission to regulate unjust and unreasonable acts or practices by public utilities. 35-A M.R.S.A. §§ 1302, 1303 and 1306. It is exactly this kind of authority that 47 U.S.C. §§ 152(d) and 253(b) preserve. Section 152(b) obviously allows states to determine what is an intrastate local service and what is an intrastate long distance service.

We have determined that Brooks's unauthorized service is unlawful, and have rejected its proposed tariff for the same RX service, for two reasons. First, Brooks has attempted to label what is an interexchange (long distance) service as local. Brooks argues that the Commission "continues to adhere to a traditional definition of local competition and condemns Brooks for offering a local exchange service that fails to sufficiently resemble the Commission's traditional view." The definition of local service (and interexchange, or long distance, service) to which Brooks objects is contained in our Chapter 280, as well as in Verizon's tariffs and interconnection agreement between Brooks and Verizon. Its function in Chapter 280 is to determine the applicability of access service (i.e., long distance wholesale service) and access charges. That definition is binding on all carriers that provide and purchase access services.

If Brooks uses the services and facilities of another carrier for the provision of Brooks's services, the amount it pays that carrier for the use of those facilities must be governed by that carrier's tariff, and in particular by the definition that carrier uses as the demarcation between local and long distance service and rates.[6] Otherwise, the purchaser could avoid wholesale long distance (access) charges simply by labeling its service as "local."[7] That, of course, is exactly what Brooks is attempting to do in this case by suggesting that the "traditional" definition of local service should not apply to its purchases of services from the carriers whose facilities it is using to provide its own service. It is obvious that if Brooks and other carriers were able to accomplish what Brooks is attempting, no carrier could sustain any distinction between local and long distance if it were required to sell wholesale long distance service to competitive carriers at a wholesale local rate.

Brooks's argument also ignores the Commission's and the public's interest, at least at the present time, in maintaining a local-long distance distinction. While the price differential between retail local and retail long distance service is plainly diminishing, it does not follow that any single carrier should be allowed to abolish the distinction without Commission involvement or public input.

In addition to Brooks's argument that it, rather than the Commission, should determine whether its service is local, Brooks continues to argue that "local competition is not defined . . . by the extent of the competitor's facilities or on the basis of whether its facilities match those of an incumbent offering a similar service." Brooks is correct that the existence or location of facilities does not determine the nature of a service. Whether a service constitutes "local competition" depends on whether the service is local exchange and has nothing to do with what facilities are used. This argument by Brooks actually appears to be nothing more than its long-standing argument that the Commission is somehow forcing Brooks to build its own facilities rather than allowing it to create its "innovative" RX service out of misassigned NXX codes and Verizon transport facilities. As we discussed at length in our last orders, that argument is incorrect. Brooks does not have to construct any facilities of its own. Nevertheless, if it were to continue some form of service that would allow toll-free calling to Internet Service Providers (ISPs), e.g., 800 service, it would have to somehow route

[6]As we found in our prior orders, Brooks and Verizon-Maine have an interconnection agreement under 47 U.S.A. § 252, but that agreement incorporates Verizon's tariff definition for distinguishing between local traffic (subject to reciprocal compensation payments under the agreement) and long distance traffic (subject to payment under Verizon's access tariff).

[7]Brooks, of course, is not by anyone's definition providing local *exchange* service in any of the 54 non-Portland locations. The term "exchange" connotes the placement of a call by a customer within the area served by the exchange, its carriage over a loop to a switch, the switching of that call, and its routing, over a loop, to another customer within the same exchange.

its traffic throughout the State. It may, of course, continue to use the same Verizon facilities that it now uses; it would simply have to pay to use them.

Even if we view Brooks's service from a retail, rather than a wholesale, perspective, it is clearly not a local exchange service in any "traditional" – or logical – sense. No Brooks customer in any of the non-Portland locations is able to make any local call within a local calling area. There are *no* Brooks customers in those locations. Brooks has no switching or loops that serve those locations. In fact, Brooks's service performs the same functions as "traditional" foreign exchange or 800 service, both of which we have found to be interexchange services. The purpose of Brooks's service is to provide free inward calling to its customers – the ISPs – located in its only local exchange, Portland. Brooks's statement at page 6 of its Motion that "Brooks has assigned numbers and is currently providing service to end-user customers using each of the NXX codes at issue" should not be understood to mean that Brooks has end-user customers in the locations where the NXX codes are assigned. Brooks's "end-user customers" are the handful of ISPs in Portland. It is the "end-user" customers of *other* telephone utilities (utilities that actually provide local exchange service to the areas to which the Brooks codes are nominally assigned) who dial up the Brooks ISP customers in Portland on a toll-free basis.[8]

The second reason that we have rejected Brooks's proposed RX service (and found the unauthorized "FX-like" service to be unlawful) is the wasteful use of 54 NXX codes (all of which have an extremely small utilization factor), when there are other reasonable alternatives that are available, such as 800 service. Brooks argues that the "FCC's delegation of authority to engage in number conservation measures cannot be used as a substitute for area code relief and must not result in the erection of barriers to competition in Maine." ("Area code relief" is the FCC's term for the creation of additional area codes.) The *Optimization* Order does state:

> The grants of authority to the state public utilities commissions, however, were not intended to allow the state commissions to engage in number conservation measures to the exclusion of, or as a substitute for, *unavoidable* and timely area code relief. (*Optimization* Order at ¶ 7). (emphasis added)

The FCC *Optimization* Order also states, however, that:

> We recognize that numbering resource optimization efforts are necessary to address the considerable burdens imposed on all entities affected by the *inefficient use of numbers*; thus, we have enlisted the states to assist us in these efforts

[8]Brooks's further statement that the disapproved service is "like other services offered by Brooks to Maine consumers" similarly implies that it is in some way providing a service directly to persons who use the internet.

> by delegating significant authority to them to implement certain measures in their local jurisdictions. In addition to the authority to implement area code relief, we have responded to requests by individual states by conditionally granting them authority to implement some of the following number conservation measures: thousands-block number pooling trails; NXX code rationing; reclamation of unused and reserved NXX codes and thousands blocks; auditing; and sequential number assignment. (emphasis added)

If there were no reasonable alternative means for Brooks to provide an interexchange service that would allow customers of ISPs to call ISPs statewide on a toll-free basis (such as 800 service) then Brooks might have some argument that the Commission was restricting the use of NXX codes "as a substitute for ... *unavoidable …* area code relief," i.e., additional area codes in Maine. Reasonable alternatives do exist, however. Two of those are 800 service and the 500 service that Verizon is implementing.

Our finding that there are reasonable alternatives has not been contested by Brooks, even in its Motion for Reconsideration. Even though such alternatives may be more expensive than the "cost" to Brooks (reciprocal compensation payments paid by Verizon to Brooks) if it were permitted to mischaracterize its service as local, it has no right (as we have found) to such compensation. The alternatives we have discussed may, or may not, be more expensive than the amount Brooks would have to pay to maintain the present configuration if it paid the access charges we have found that it is obligated to pay under its interconnection agreement with Verizon.

Brooks plainly is engaged in the "inefficient use of numbers" (*Optimization* Order at ¶ 7). Its continued use of those numbers would inevitably lead to "area code relief" that is clearly avoidable (*Optimization* Order at ¶ 7).

IV. CONCLUSION; ORDERING PARAGRAPH

For the reasons stated in this Order, we DENY the requests by New England Fiber Communications, LLC, d/b/a Brooks Fiber to modify our Order in *New England Fiber Communications d/b/a Brooks Fiber, Proposed Tariff Revision to Introduce Regional Exchange (RX) Service,* Docket No. 99-593, and in Order No. 4, *Public Utilities Commission, Investigation into Use of Central Office Codes (NXXs) by New England Fiber Communications, LLC d/b/a Brooks Fiber,* Docket No. 98-758, EXCEPT that, in Docket No. 98-758, we ORDER that the North American Numbering Plan Administrator (NANPA) shall rescind and reclaim the 54 central office codes assigned to New England Fiber Communications, LLC six months from the date of this Order, rather than on the date stated in previous orders.

Dated at Augusta, Maine, this 14th day of November, 2000.

BY ORDER OF THE COMMISSION

_____
Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.